

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76 Civ 7243

71 Civ 5525

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUBREY B. LANK, as Receiver of PICKARD &
COMPANY, INCORPORATED,

Plaintiff-Appellee,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant-Appellant.

On Appeal pursuant to 28 U.S.C. §1292(b) from
the United States District Court for the Southern
District of New York (71 Civ. 5525)

PETITION FOR REHEARING

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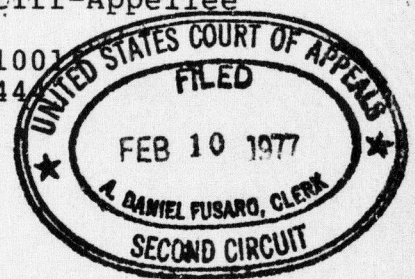


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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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AUBREY B. LANK, as Receiver of :
PICKARD & COMPANY, INCORPORATED, :
Plaintiff-Appellee, :
-against- : Docket No. 76-7243
THE NEW YORK STOCK EXCHANGE, :
Defendant-Appellant. :
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PETITION FOR REHEARING

TO THE HONORABLE HAROLD R. MEDINA, JAMES L. OAKES, AND
MURREY I. GURFEIN, JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Aubrey B. Lank, as Receiver of Pickard & Company,
Incorporated, the plaintiff-appellee (hereinafter the
"Receiver") respectfully petitions this Court for a rehear-
ing of its decision of January 20, 1977, pursuant to Rule
40 of the Federal Rules of Appellate Procedure.

In an opinion by Judge Medina joined in by Judge Gurfein and Judge Oakes, the Court answered in the negative the question certified, pursuant to 28 U.S.C. §1292(b), by Judge Lasker of the United States District Court for the Southern District of New York of

"(1) Whether the receiver of a former member corporation of the [New York Stock] Exchange has standing (or alternatively capacity) to assert a claim against the Exchange under Section 6 of the Securities Exchange Act of 1934 on behalf of the member corporation[.]

The Court reversed the order of Judge Lasker, which found that the Receiver stated a claim for relief under Section 6 of the Securities Exchange Act of 1934, and directed that the complaint herein be dismissed.

The Receiver seeks a rehearing of that portion of the order of this Court dismissing the complaint and asks that the mandate simply answer the certified question in the negative. This action should then be remanded to the District Court for consideration of the common law counts in the complaint of fraud, negligence and breach of contract, for which jurisdiction based on diversity of citizenship between the parties exists.

Statement of Facts

This action was commenced by Aubrey Lank, a citizen of Delaware, as the Receiver appointed by the Chancery Court of Delaware for Pickard & Company, Incorporated, a defunct brokerage firm and former member of the New York Stock Exchange (the "Exchange"). In the complaint, the Receiver alleged four claims for relief against the Exchange. The first was for the violation by the Exchange of Section 6 of the Securities and Exchange Act of 1934, and is the count which this Court has held fails to state a claim for relief. The complaint also contains, in the second, third and fourth counts, common law claims of fraud, negligence and breach of contract (JA-6a-15a). These common law counts were not considered by the Court below (JA-241a) nor by this Court on the appeal.

Although the complaint grounds jurisdiction over the three common law claims on the doctrine of pendent jurisdiction, there is diversity between the parties in this action and only the federal claim should now be dismissed. At the time this action was commenced in December of 1971, the Receiver, Mr. Lank, was a citizen of Delaware (JA-90a) and the Exchange was a New York not-for-profit corporation organized and existing under the laws of the State of New

York with its principal place of business in New York (JA-7a). Thus, the complaint in this action and the record on the appeal demonstrate that diversity jurisdiction exists for the three common law counts.

The Exchange counterclaimed against the Receiver for \$227,007.51 based on agreements in which Pickard undertook to reimburse the Exchange and the Special Trust Fund of the Exchange for certain expenses incurred in the liquidation of Pickard (JA-16a, 235a). The Exchange pleaded its counterclaims as compulsory counterclaims and did not allege independent jurisdictional grounds for them. The District Court granted the Exchange summary judgment on its first two counterclaims on the issue of liability but held that the proof was inadequate to establish the amount of liability on the motion. These counterclaims and the summary judgment motion respecting them were not before this Court on the appeal.

ARGUMENT

THIS ACTION SHOULD BE REMANDED AND PLAINTIFF
AFFORDED THE OPPORTUNITY TO APPLY TO THE COURT
BELOW FOR LEAVE TO AMEND THE COMPLAINT TO PLEAD
JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP
AND FOR FURTHER PROCEEDINGS IN THE DISTRICT COURT

It is clear that the parties in this action are of

diverse citizenship and that federal jurisdiction over this action exists under 28 U.S.C. §1332. Aubrey Lank, as Receiver, is a citizen of the State of Delaware and has been so found in another action which he commenced as Receiver of Pickard & Company, Incorporated. Lank v. Federal Insurance Company, 309 F.Supp. 349 (D.Del. 1970). See also 3A Moore's Federal Practice (2d ed.), ¶17.04.

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend the complaint should be freely granted when it is necessary to do so to establish jurisdiction. United Steel Workers of America, AFL-CIO v. Mesker Bros. Industries, Inc., 457 F.2d 91 (8th Cir. 1972); International Ladies Garment Workers Union v. Donnelly Garment Co., 121 F.2d 561 (8th Cir. 1941); 3 Moore's Federal Practice (2d ed.) ¶15.09, 15.11. Such leave can be granted following a dismissal on appeal for lack of jurisdiction and the action remanded for the express purpose of allowing amendments to show jurisdiction. Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80 (2d Cir. 1961).

In International Ladies Garment Workers Union v. Donnelly, supra, the action was dismissed by the Eighth Circuit for want of jurisdiction under the Sherman Antitrust Act. However, the Eighth Circuit, on rehearing, directed

that the case be remanded and plaintiffs afforded an opportunity to apply to the District Court for leave to amend the complaint to show jurisdiction based on diversity of citizenship. The Court there recognized that the federal courts should allow great liberality in the amendment of pleadings, particularly where the defendant clearly had notice from the beginning of the action of the conduct on which plaintiff bases his claim.

A remand to consider the common law claims would be entirely consistent with the policy of Rule 15 of the Federal Rules of Civil Procedures and of 28 U.S.C. §1653 that the district courts are to consider requests to amend the pleadings so as to provide maximum opportunity for each claim to be decided on the merits. Rule 15 also recognizes the limited role assigned to pleadings under the federal rules, which is to provide the parties with notice of the pleader's claim and the transactions and occurrences that have been called into question. See, e.g., Green v. Wolf Corporation, 50 F.R.D. 220 (S.D.N.Y. 1970); Doran v. Lee, 287 F.Supp. 807 (W.D. Pa. 1968); 6 Wright and Miller, Federal Practice and Procedure, §§1471, 1497.

Moreover, this is not the usual case of amendments to pleadings being sought after appeal, since this is an

interlocutory appeal taken before discovery was completed and before a trial has been had. The Exchange cannot be prejudiced if this action is permitted to proceed upon different jurisdictional grounds. The acts of the Exchange which form the basis of the common law counts are essentially the same as those on which the Section 6 claim was predicated. The Exchange has had notice of the claims since the complaint was filed, and there is another action currently pending in the Southern District which arises out of the same occurrences as are at issue here - Fischer v. New York Stock Exchange (S.D.N.Y. 75 Civ. 1638). (See also Note 6 to the opinion below at JA-242a.)

The amended complaint plaintiff now seeks would, of course, relate back to the date of filing of the original complaint, since only the jurisdictional predicate would be changed. The claim in the amended complaint would meet the test of Rule 15(c) since it "[arises] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Tiller v. Atlantic Coast Line R.C., 323 U.S. 574, 65 S.Ct. 421 (1945); 3 Moore's, Federal Practice (2d ed.) ¶15.15[3].

In addition, this action, presumably, will still continue in the District Court with further proceedings on the Exchange's counterclaim. While it is true that compulsory counterclaims are often dismissed when the federal

claim in the complaint is dismissed, there is authority to the effect that the Court can adjudicate the counterclaim if plaintiff's claim is dismissed for failure to state a claim for which relief may be granted. 6 Wright & Miller, Federal Practice and Procedure, §1414. But, of course, the Exchange does have the independent jurisdictional ground of diversity of citizenship for its counterclaim and could seek to amend its counterclaim to state this ground. Thus, it is probable that this action will continue in the District Court and the Receiver should not be precluded from asserting his common law claims.

Conclusion

The order of this Court dismissing the complaint failed to consider the strong and well-founded policy of the federal rules freely to allow amendments to the pleadings and would deny the Receiver the opportunity to pursue his common law claims against the Stock Exchange. For the reasons stated herein, it is respectfully urged that the petition for rehearing be granted and that this action be remanded to the District Court for further proceedings.

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